

**Exhibit 3**

Entergy Response to Board Memorandum

Vt. Public Service Bd., Dkt. 7440 (March 7, 2012)

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Petition of Entergy Nuclear Vermont Yankee, LLC, and	)	
Entergy Nuclear Operations, Inc., for amendment of	)	
their Certificates of Public Good and other approvals	)	
required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A.	)	Docket No. 7440
§§ 231(a), 248 & 254, for authority to continue after	)	
March 21, 2012, operation of the Vermont Yankee	)	
Nuclear Power Station, including the storage of	)	
spent-nuclear fuel	)	

**RESPONSE OF ENTERGY NUCLEAR VERMONT YANKEE, LLC AND  
ENTERGY NUCLEAR OPERATIONS, INC. TO THE PUBLIC SERVICE  
BOARD'S MEMORANDUM DATED FEBRUARY 22, 2012**

**I. Procedural Background**

On January 19, 2012, the U.S. District Court for the District of Vermont issued its “Decision and Order on the Merits of Plaintiffs’ Complaint” in *Entergy Nuclear Vermont Yankee, LLC, Entergy Nuclear Operations, Inc. v. Shumlin et al.*, No. 1:11-cv-99 (D. Vt. Jan 19, 2012) (the “District Court Decision”), ruling that the Atomic Energy Act (the “AEA”)<sup>1</sup> preempted Act 160<sup>2</sup> and a portion of Act 74<sup>3</sup> and granting injunctive relief to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (together, “Entergy VY” or the “Company”) based upon the AEA and the Dormant Commerce Clause of the U.S. Constitution. The District Court’s Decision was entered the following day.<sup>4</sup>

On January 31, 2012, Entergy VY filed its “Motion Seeking Issuance of a Final Decision and Order Granting CPG” with the Vermont Public Service Board (the “Board”) in Docket No. 7440. On February 1, 2012, the Board issued a memorandum asking parties to submit their responses to Entergy VY’s motion by March 2, 2012.

On February 14, 2012, the Board issued a Notice of Hearing stating that it would conduct a Status Conference in Docket No. 7440 on March 9, 2012. On February 22, 2012, the Board issued a memorandum requesting that the parties respond to a number of questions on the scope

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<sup>1</sup> 42 U.S.C. § 2011 *et seq.*

<sup>2</sup> Act 160, 2006 Vt. Acts & Resolves 204.

<sup>3</sup> Act 74, 2005 Vt. Acts & Resolves 599.

<sup>4</sup> On February 18, 2012, the Defendants in the District Court proceeding filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit. On February 27, 2012, Entergy VY filed a timely Notice of Cross-Appeal of the District Court Decision. Also on February 27, 2012, Entergy VY filed in the District Court a Motion for Relief from Judgment, pursuant to Federal Rule of Civil Procedure 60(b)(1) and (6), as well as an Expedited Motion for an Injunction Pending Appeal to the Circuit Court, pursuant to Federal Rule of Civil Procedure 62(c) and Rule 8(a)(1) of the Federal Rules of Appellate Procedure.

of the Board's jurisdiction as well as on further proceedings in this docket. On March 1, 2012, the Board issued an order enlarging the time for parties to respond to these questions until noon on March 7, 2012.

On behalf of Entergy VY, this memorandum responds to each of the questions that the Board asked in its February 22 memorandum.

## **II. Board Questions and Entergy VY's Responses**

**Q1. What is the scope of review for Entergy's petition? Entergy originally petitioned under 30 V.S.A. §§ 231, 248 and 254 as well as 10 V.S.A. §§ 6501-6504. The District Court's Declaratory Judgment states that Act 160 is preempted, including the provisions of Sections 248(e)(2) and 254.**

The precise scope of the Board's authority was not a question that was before the District Court.<sup>5</sup> Although the District Court invalidated the preempted sections added by Acts 74 and 160, Vermont statutes still confer limited authority upon the Board over the continued operation of the Vermont Yankee Nuclear Power Station ("VY") so long as that authority is exercised on non-preempted grounds consistent with both federal and state law.

In particular, the Board still has authority to issue a CPG for VY's continued operation under Section 231 of Title 30, Vermont Statutes Annotated.<sup>6</sup> The Board, however, may not consider evidence or impose conditions that concern radiological safety or interfere with interstate commerce by focusing on the existence (or absence) of a power-purchase agreement ("PPA") providing VY power to distribution utilities in Vermont at below-market rates not available to customers in other states.<sup>7</sup> Nor may the Board consider evidence or impose conditions that relate to these preempted areas in the sense of a "truism." *See* District Court Decision at 67 (discussing *Vango Media, Inc. v. City of N.Y.*, 34 F.3d 68, 73 (2d Cir. 1994) (City's "permissible" purpose of regulating economic impacts "did not save the statute" because it is "a 'truism that almost all matters touching on matters of public concern have an associated economic impact on society,' and in the case at hand, it did not displace what [the Second Circuit] concluded was the City's 'primary interest' in [the preempted concern,] public health")). Nor, finally, may the Board

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<sup>5</sup> District Court Decision at 71.

<sup>6</sup> This Board ruled in 2002, before Act 160 was enacted, that § 231 gave the Board authority to approve the transfer of VY but that § 248 did not apply to VY unless an upgrade or addition to the plant was proposed. Docket No. 6545, *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corp. re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC, and related transactions*, Order of 6/13/2002 at 80, 94, *aff'd. In re Proposed Sale of Vt. Yankee Nuclear Power Station*, 175 Vt. 368, 371-72, 829 A.2d 1284 (2003). While Act 160's addition of subsection (e)(2) to § 248 expanded that section to cover the continued operation of VY, with § 248(e)(2) now invalidated the Board's review of a CPG for continued operation of VY is again governed by § 231 along with such ancillary provisions as the Board may invoke. *See, e.g.*, 30 V.S.A. §§ 203, 209 (general grants of Board jurisdiction).

<sup>7</sup> *See* District Court Decision at 77 (noting it is preempted to "wan[t] financial compensation for the perceived safety risk of having Vermont Yankee within the state"); *id.* at 79 (state regulation "grounded in . . . radiological safety concerns" is preempted by the Atomic Energy Act"); *id.* at 93 ("a state's requirement that a wholesale plant satisfy local demands and provide its residents an 'economic benefit' not available to customers in other states runs afoul of the Commerce Clause").

“blindly accept” the “articulated purposes” that may be offered in opposition to Entergy VY’s petition for an amended or new CPG. District Court Decision at 74 (internal quotation marks omitted).

**However, the Permanent Injunction relates only to barring the state from enforcing Act 160 to compel Vermont Yankee to shut down due to failure to receive legislative approval. (a) Under the language of Title 10, Chapter 157 (as modified by the District Court Order), does the Board have authority to grant Entergy VY’s petition under that Chapter?**

As an initial matter, Entergy VY respectfully submits that the question’s premise that “the Permanent Injunction relates only to barring the state from enforcing Act 160” is not complete. The District Court Decision also explicitly bars the state from enforcing Act 74 to compel VY to shut down or to prevent storage of nuclear fuel after March 21, 2012, because it failed to obtain legislative approval. District Court Decision at 101.

The Board’s question asks whether, in light of the District Court Decision, the Board has authority to grant Entergy VY’s petition for a CPG under Chapter 157 of Title 10, Vermont Statutes Annotated (“Chapter 157”), titled “Storage of Radioactive Material,” as modified by the District Court Decision. As so modified, the provisions of Chapter 157 are either inapplicable, enjoined or cannot be enforced consistent with the District Court Decision.

Chapter 157 includes 10 V.S.A. § 6501 and § 6522. Section 6501 requires legislative approval for the “*construct[ion] or establish[ment]*” of a “*facility* for deposit, storage, reprocessing or disposal of spent nuclear fuel elements or radioactive waste material.” 10 V.S.A. § 6501(a) (emphasis added). Section 6501 does not apply to the interim *storage* of spent nuclear fuel at VY in either of two, *already-constructed and established facilities* (the spent-fuel pool or the dry-cask pad approved by the Board in Docket No. 7082 in 2006<sup>8</sup>). Entergy VY’s CPG application does not propose to construct or establish a new facility for the storage of spent-fuel elements or radioactive waste generated by VY as a result of operations after March 21, 2012.

Section 6522 (added in 2005 as part of Act 74) is entitled “Public service board review of proposals for *new* storage facilities for spent nuclear fuel” (emphasis added) and provides that “[n]either the owners of Vermont Yankee nor their successors and assigns shall commence *construction or establishment* of any new storage *facility* for spent nuclear fuel before receiving a certificate of public good from the public service board pursuant to 30 V.S.A. § 248.” 10 V.S.A. § 6522(a) (emphasis added). On its face, this provision thus applies only to the criteria and conditions for the Board’s issuance of the initial CPG to construct the dry-fuel-storage facility approved in Docket No. 7082. With respect to this section, moreover, the District Court Decision found that preempted radiological safety concerns were the primary motivating force for enacting Act 74. *See* District Court Decision at 79 (“The legislative history shows Act 74, including the provision that storage of spent fuel derived from post-March 21, 2012 operations

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<sup>8</sup> Docket No. 7082, *Pet. of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for a certificate of public good to construct a dry fuel storage facility at the Vermont Yankee Nuclear Power Station, in Vernon, Vermont*, Order of 4/26/2006, at 89-91.

requires legislative approval, is grounded in the legislature’s radiological concerns.”); *id.* at 81 (“The Court finds, after reviewing the legislative history and transcripts, and listening to recordings of relevant legislator statements, that radiological safety concerns were the primary motivating force for enacting Act 74, in particular for the requirement for affirmative legislative approval for spent fuel storage after March 21, 2012.”).

While the District Court Decision thus explicitly recognized that Act 74 had a preempted purpose, it concluded that injunctive relief should be narrowly tailored to fit specific provisions the effect of which would be preempted. *Id.* at 100. The District Court observed that the “provision within section 6522(c)(4) requiring legislative approval appears to be the only provision in Chapter 157 which requires approval of any kind to *store* fuel beyond March 21, 2012,” District Court Decision at 79 n.27 (emphasis added), and accordingly determined that this legislative-approval requirement was the only part of Act 74 that needed to be enjoined, *see* District Court Decision at 81-82. For this reason, the Permanent Injunction enjoined enforcement of that part of Section 6522(c)(4) requiring legislative approval of the storage of spent nuclear fuel derived from the operation of VY after March 21, 2012. District Court Decision at 100.

Although the District Court did not specifically address Section 6522(c)(2), its statement about “section 6522(c)(4)” being the “only provision in Chapter 157 which requires approval of any kind to store fuel beyond March 21, 2012,” necessarily means that the Court did *not* view Section 6522(c)(2) as requiring approval of any kind for the storage of fuel beyond March 21, 2012. Such an interpretation of Section 6522(c)(2) is correct because the General Assembly expressly appropriated to itself in Section 6522(c)(4) the responsibility for approving the storage of spent fuel from operation after March 21, 2012. In Section 6522(c)(2), the General Assembly did not authorize the Board—in the CPG issued in Docket No. 7082 *or in a later CPG*—to permit the storage of spent fuel from operation after that date. Stated differently, the Board exercised in full its authority to issue a CPG for the storage of spent fuel at VY under Chapter 157 when it issued a CPG in that docket. *Compare* Act 160 *with* 30 V.S.A. § 248(e)(2) (invalidated, however, by the District Court Decision) (contemplating an initial decision by the General Assembly followed by a decision by the Board regarding *operation* of Vermont Yankee). Now that Section 6522(c)(4) has been invalidated, there is no statutorily-based authority for the General Assembly or the Board to regulate storage of spent fuel derived from post-March 21, 2012, operations in an already-constructed facility.<sup>9</sup>

Thus, the Board’s authority to issue a new or amended CPG to Entergy VY derives from 30 V.S.A. § 231, and with the invalidation of Act 160’s legislative-approval requirement the Board is authorized under § 231 to grant Entergy VY’s CPG application.<sup>10</sup>

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<sup>9</sup>Entergy VY respectfully submits that the District Court, within the context of Entergy VY’s pending post-judgment motions, will clarify that the court adopts the narrow interpretation of Section 6522(c)(2) set forth above or will hold that a broader interpretation makes Section 6522(c)(2) invalid.

<sup>10</sup> Even if Section 6522(c)(2) is not inapplicable or invalidated by the District Court Decision, Entergy VY notes that it would not prevent VY from operating past March 21, 2012, until the next refueling outage currently scheduled for March 2013. During that period, operation of VY will not increase the “cumulative total amount of spent fuel stored at Vermont Yankee” beyond “the amount derived from operation of the facility up to, but not beyond, March 21,

**Q2. To what degree can the Board rely upon the existing record? In its comments, the NEC observes that Entergy VY had taken the position before the District Court that the record in Docket 7440 was tainted and that it was necessary to start over in a new docket. Is this Entergy VY's position? If so, is it not essential that the Board start over to ensure that the record does not remain subject to challenge?**

The Board can rely upon the existing record to issue the CPG, so long as the Board does not consider any evidence in the record that reflects considerations the District Court found to be preempted by federal law. Although the record was developed several years ago, the findings and conclusions that the Board can reach on non-preempted evidence—such as the substantial economic benefit that both Entergy VY's and the Department of Public Service's studies show will result from VY's continued operation—would not change, as explained below in response to Question 3.

This position is consistent with the position Entergy VY took during the District Court proceedings. There, before the scope and extent of the District Court's ultimate ruling was known, Entergy VY stated that, while it might be safer to have a "fresh start" to the CPG proceeding before the Board, continuing in the current docket under the existing record would be acceptable as long as the Board did not consider any preempted evidence or materials. The following is an excerpt from Entergy VY's closing argument:

So, Your Honor, I don't know how involved you want to get in the State administrative process, *but what we argue to Your Honor is you would have to enjoin the PSB from withholding a Certificate of Public Good on grounds of nuclear safety and whether you do that within the current docket, telling them they have to in a sense scrub that docket of any tainted part, including the 189 report, or whether it's simpler for you to simply say start over on a clean slate, we think that's within Your Honor's discretion.* Our key point is that we would like you to make a legal ruling that neither the Legislature under Act 74 or Act 160, which we believe you should strike down in their entirety, nor the Public Service Board under any residual authority, can consider nuclear safety. *And if you think they can, in a sense, close their eyes and ears to the tainted portions of existing record and clean it up, that would be*

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2012," 10 V.S.A. § 6522(c)(2), because the fuel currently in the plant's core is already irradiated and will have to be stored at VY as spent nuclear fuel until the Department of Energy can take delivery of it. That is true whether the plant stops operation on March 21, 2012, or continues to operate beyond that date until the next refueling. Operation of the plant after March 21, 2012, until the next refueling will thus not increase the "cumulative total amount of spent fuel"—measured by either the total number of fuel assemblies or the total physical volume of spent fuel—stored at VY. Indeed, because mass is converted to energy in the nuclear fission process (in accordance with Einstein's famous  $E=mc^2$  formula), the total amount of spent fuel, measured by mass, will slightly decrease as a result of operation after March 21, 2012 until the next scheduled refueling in March 2013. See [www.chem.purdue.edu/gchelp/howtosolveit/Nuclear/Energy\\_of\\_Nuclear\\_Change.htm](http://www.chem.purdue.edu/gchelp/howtosolveit/Nuclear/Energy_of_Nuclear_Change.htm).

*acceptable as long as you think it's doable. We think the safer course would be to start over.*

Transcript of Sept. 14, 2011 Oral Argument at 678-79, *Entergy Nuclear Vermont Yankee, LLC, Entergy Nuclear Operations, Inc. v. Shumlin*, No. 1:11-cv-99 (D. Vt. Jan. 19, 2012) (emphasis added).

The District Court did not decide whether the Board should start over in a new docket or simply set aside the preempted portions of the record. As reflected in Entergy VY's Motion Seeking Issuance of a Final Decision and Order Granting CPG, Entergy VY believes that the Board should grant its petition for an amended or new CPG based on the non-preempted portions of the existing record. In so doing, the Board should follow both the letter and the clear intent of the District Court Decision by confining itself to issues of legitimate state authority, that is, issues, unrelated to the radiological safety of VY's operations and issues unrelated to the price at which VY sells power to utilities within the state.

**Q3. If the Board uses the existing record as a starting point, to what extent is it necessary to allow parties the opportunity to update the record?**

As noted in the Company's pending motion, the parties have litigated and the Board has before it substantial record evidence of VY's economic benefit to the state in all areas of its jurisdiction that are not preempted. It is important to recognize in that regard that "the law does not set out how much economic benefit there should be, but rather simply directs that there be an economic benefit."<sup>11</sup>

**(a) Are the economic analyses still valid or is it necessary to update them?**

The ultimate conclusion to be drawn from the economic analyses in the record is still valid, and updating those analyses would not change that conclusion. Two studies—one sponsored by Entergy VY and one by the Department of Public Service—showed substantial present-value benefits to VY's continued operation in terms of employment, government revenue and other economic benefits. If updated, the studies would inevitably reach the same result: continued operation of VY has an enormous beneficial effect in terms of well-paying jobs, taxes paid and other sources of government revenue, and the multiplier economic impact on the state and especially Windham County. In fact, because the entire purpose of the taxes and government fees imposed upon Entergy VY is to compensate for any *non-preempted* burdens that VY imposes on the state and local municipalities, the substantial economic benefits provided by VY's well-paying jobs and their multiplier effects alone constitute pure economic benefit for the state.

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<sup>11</sup> Docket No. 6812, *Pet. of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., for a certificate of public good to modify certain generation facilities at the Vermont Yankee Nuclear Power Station in order to increase the Station's generation output*, Order of 3/15/2004 at 25.

Although not necessary for a finding of economic benefit, Paragraph 4 of the Memorandum of Understanding approved in Docket No. 6545, which provides for a sharing of revenues in certain circumstances, will also provide valuable protection against higher energy prices in the future under any scenario that may be projected. While current wholesale electric prices are lower than the projections used in the studies in the record, it is not possible to predict with certainty how long the current low price levels will remain in effect. Thus, while the value of this provision to Vermont may be uncertain, it is indisputable that Paragraph 4 provides insurance against volatile wholesale market prices. This benefit, moreover, would be in addition to the substantial benefits of employment, government revenue and the other economic benefits established in the existing record.

**(b) What changes to the record are necessary based upon Entergy VY's testimony that it subsequently acknowledged to be less than fully accurate? Do parties need an opportunity to respond to any changes that Entergy VY seeks to make to the record?**

No additional evidence is needed. The testimony and discovery responses that Entergy has corrected involve underground piping carrying radionuclides, which was one of the areas to be audited pursuant to Act 189.<sup>12</sup> The Board's authority with respect to both piping carrying radionuclides in general and more particularly under Act 189, which the District Court Decision found was "replete with references to safety," is preempted.<sup>13</sup> For that reason, the Board may not admit any additional evidence on these issues.

Nor may such additional evidence be considered under the rubric of evaluating whether Entergy VY is a fair partner for Vermont.<sup>14</sup> This articulated purpose is a truism or pretext for the safety and below-market-PPA rationales that the District Court found preempted by the AEA and precluded by the Dormant Commerce Clause. Notably, similar arguments based on Entergy VY supposedly not being a fair partner for Vermont were made to the District Court, which unqualifiedly rejected them: "Defendants have offered no evidence Entergy acted inequitably or in bad faith, and for the reasons discussed above, the Court holds this argument is unpersuasive." District Court Decision at 99.<sup>15</sup> Moreover, other utility companies have had at least equally

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<sup>12</sup> See filings dated January 29, 2010 (correction to A.VPIRG:EN.4-6) and April 1, 2010 (Aff. of Norm Rademacher addressing page 25 of Exh. EN-MJC-2 and page 12 of App. C to that exhibit), by which Entergy VY corrected an inaccurate discovery response and clarified an exhibit to the testimony of Michael Colomb.

<sup>13</sup> District Court Decision at 82. The District Court Decision found, however, that Entergy VY's challenge to Act 189 was moot because of the State's representation that Act 189 is no longer in effect. *See id.*

<sup>14</sup> *See* New England Coalition Inc.'s Opposition to Motion Seeking Issuance of a Final Decision and Order Granting CPG at 4 (Feb. 2, 2012).

<sup>15</sup> In the event other parties assert a claimed concern about not trusting Entergy VY as a "fair" or "trustworthy" business partner, purchasers and Vermont can satisfy any such concern after 2012 by choosing to purchase power from suppliers they trust.

serious failings in proceedings before the Board without the Board barring them altogether from operating their businesses in the state.<sup>16</sup>

In addition to correcting the testimony and discovery responses concerning underground piping carrying radionuclides, under the Board's Procedural Order of January 29, 2010, Entergy VY examined the entire record and verified the accuracy of the information that the Company provided to the Board. This validation process did not result in material differences in the record evidence in non-preempted areas of the Board's jurisdiction.

**(c) Are further updates necessary to reflect intervening events (such as Entergy VY's challenge to Vermont law or the NRC's grant of a license extension)?**

As explained above, Entergy VY believes the Board can decide its application for a new or amended CPG based upon the substantial record already developed in all areas of its jurisdiction that are not preempted.<sup>17</sup> The District Court Decision, which the Board should consider as part of the legal framework, narrows the scope of the Board's jurisdiction, and the Board has a fully sufficient record, without taking any additional evidence, to issue a decision either amending the existing CPG or issuing a new one to authorize operation of VY for an additional twenty years.

Entergy VY's federal court challenge to Vermont law as well as the Nuclear Regulatory Commission's renewal of VY's license, moreover, are both documented in publicly available materials. The Board can take judicial (administrative) notice of these materials or occurrences. *See* V.R.E. 201 (permitting a court to take judicial notice of a fact, not reasonably in dispute, that is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned); Board Rule 2.216(A) (evidentiary matters are governed by 3 V.S.A. § 810); 3 V.S.A. § 810(4) (notice may be taken of judicially cognizable facts).

**(d) Under 10 V.S.A. § 6522, "Any certificate of public good issued by the board shall limit the cumulative total amount of spent fuel stored at VY to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012, the end of the current operating license." It appears that this provision, which was incorporated in the Docket 7082 CPG, has not been preempted by the District Court. Does the record contain evidence on how Entergy VY will comply with this requirement?**

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<sup>16</sup> *E.g.*, Docket No. 7044, *Pet. of City of Burlington d/b/a Burlington Telecom. for a certificate of public good to operate a cable television system in the City of Burlington, Vermont (In Re: Amended Petition to amend Condition No. 17 of CPG related to completion of system build-out and to grant temporary relief from limitation in Condition No. 60 of CPG on financing operations)*, Order of 10/8/10 at 30 ("Based on the number, magnitude and duration of Burlington Telecom's admitted violations of Condition 60 of the CPG, the words 'wanton disregard,' as commonly understood, are an appropriate characterization of Burlington Telecom's behavior").

<sup>17</sup> Entergy VY's Motion Seeking Issuance of A Final Decision and Order Granting CPG at 2.

Entergy VY disagrees that the quoted provision, found in 10 V.S.A. § 6522(c)(2), can be given effect consistent with the District Court Decision. As explained above in the Company's response to Question 1, the District Court Decision concluded that "section 6522(c)(4) requiring legislative approval appears to be the only provision in Chapter 157 which requires *approval of any kind* to store fuel beyond March 21, 2012." District Court Decision at 79 n.27 (emphasis added). If the Board were to order shutdown of the VY Station based on Section 6522(c)(2), it would impose—in contravention of the District Court Decision—another approval requirement under this chapter for storage of spent nuclear fuel, which would force Entergy VY to obtain an amendment to Chapter 157 to store spent nuclear fuel beyond the "cumulative total amount ... derived from the operation of the facility up to, but not beyond, March 21, 2012," thereby effectively reinstating the legislative-approval requirement that the District Court permanently enjoined.

In addition, Entergy VY submitted a timely application for renewal of its CPG on March 3, 2008. Section 814(b) of Title 3, Vermont Statutes Annotated, provides that "[w]hen a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency." The District Court interpreted this provision to mean that "Vermont law provides that a license subject to an agency's notice and hearing requirements does not expire until a final determination on an application for renewal has been made." District Court Decision at 8. Entergy VY timely submitted the petition four years ago, and after voluminous discovery requests, resulting in the production of over 358,000 pages of documents by Entergy VY, ten technical hearings, and briefing, its petition has not yet been finally determined by the Board (presumably because the Board was barred from doing so under a state statute that the District Court Decision has now invalidated), thus bringing it within Section 814(b)'s provision that a timely and sufficient application has been made but not finally determined.

Entergy VY also refers the Board to, and hereby incorporates by reference, its responses to Question 4 below, which address this same issue in greater detail.

**Q4. To what extent can Entergy VY operate past March 21, 2012?**

**(a) Does Entergy VY plan to operate past March 21, 2012, if the Board has not yet issued a CPG? If so, what does Entergy VY plan to do with spent fuel generated as a result of such operation?**

Yes, Entergy VY plans to operate past March 21, 2012, if the Board has not yet issued a CPG. As explained in response to Questions 1 and 3(d) above, attempting to give effect to the provisions of 10 V.S.A. § 6522(c)(2) to preclude VY's operation after that date would contravene the District Court Decision and effectively re-impose the legislative-approval requirement in Act 74 that was held to be preempted. Moreover, Entergy VY submitted a timely petition for renewal of its CPG in 2008, and this petition has not yet been finally determined by the Board. Under 3 V.S.A. § 814(b), Entergy VY's existing CPG does not expire until the petition has been finally determined by the Board. In any event, as explained in response to

Question 1, VY's operation after March 21, 2012, until the next scheduled refueling will not increase the total cumulative amount of spent fuel to be stored at the site.

**(b) Is such operation barred by 10 V.S.A. § 6522(c)(5), which provides:**  
**“Compliance with the provisions of this subchapter shall not confer any expectation or entitlement to continued operation of Vermont Yankee following the expiration of its current operating license on March 21, 2012. Before the owners of the generation facility may operate the generation facility beyond that date, they must first obtain a certificate of public good from the public service board under Title 30.”? Does this enactment take precedence over the general provisions of 3 VSA 814?**

No, 10 V.S.A. § 6522(c)(5) does not displace 3 V.S.A. § 814(b), as explained in the response to Question 3(d) above. This provision merely reflects that Entergy VY's existing CPG is of limited duration for operation of VY and that Entergy VY must seek an amended or new CPG for continued operation of the plant. It does not expressly or by any reasonable implication reflect a statutory intent to repeal 3 V.S.A. § 814(b) as to VY.<sup>18</sup>

Construing 10 V.S.A. § 6522(c)(5) to require Entergy VY not just to have submitted a timely renewal application for but also actually to “obtain” a CPG, moreover, would contravene the District Court Decision, which concluded that “section 6522(c)(4) requiring legislative approval appears to be the only provision in Chapter 157 which requires *approval of any kind* to store fuel beyond March 21, 2012.” District Court Decision at 79, n.27 (emphasis added). Such a requirement would effectively reinstate the legislative-approval requirement that the District Court held to be preempted and permanently enjoined. It would also unfairly punish Entergy VY for the delay caused by the presence in Vermont statutory law of now-invalidated provisions that prevented the Board from making a final determination on Entergy VY's timely-filed petition for a new or amended CPG.

In the District Court, the State Defendants did not dispute Entergy VY's reference to the application of 3 V.S.A. § 814(b) to Entergy VY's CPG application.<sup>19</sup> Nor did the State Defendants cite any evidence to show that Entergy VY expressly or by reasonable implication waived the rights conferred by that statutory provision. The District Court Decision accordingly cited 3 V.S.A. § 814 and concluded, as explained above, that the legislative-approval requirement in 10 V.S.A. § 6522(c)(4) constituted the only provision requiring “approval of any kind” to store fuel beyond March 21, 2012. A reversal of position and assertion that 10 V.S.A. § 6522(c)(5) displaces 3 V.S.A. § 814 would be unfair and unjust.

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<sup>18</sup> See, e.g., *State v. Foley*, 140 Vt. 643, 645-46, 443 A.2d 452 (1982) (explaining that a presumption against repeal by implication exists under Vermont law: “Repeal is implied [only] if the statutes are so far repugnant that they cannot stand together or the later act covers the whole subject of the former and plainly shows that it was intended as a substitute therefor.”) (quotation omitted).

<sup>19</sup> Plaintiffs' Post-Trial Brief at 20 n.22, *Entergy Nuclear Vermont Yankee, LLC, Entergy Nuclear Operations, Inc. v. Shumlin et al*, No. 1:11-cv-99 (D. Vt. Sept. 26, 2011).

**(c) The District Court Order observed that “The Board’s order also expressly limited the total fuel that could be stored to amounts derived from operation through 2012, the end of the current operating license.” What effect, if any, does this have on Entergy’s operation beyond March 21, 2012?**

As the District Court Decision noted, the Board’s final order in Docket No. 7082 at 90 incorporated (with only an immaterial change in word order) the language of 10 V.S.A. § 6522(c)(2): “The cumulative total amount of spent nuclear fuel stored at Vermont Yankee is limited to the amount derived from the operation of the facility up to, but not beyond, the end of the current operating license, March 21, 2012.” The provisions of 10 V.S.A. § 6522(c)(2) cannot be given effect, however, without contravening the District Court Decision for the reasons explained in Entergy VY’s responses to Question 1 and Question 3(d) above. The reasons that 10 V.S.A. § 6522(c)(2) cannot be given effect apply equally to the Board’s order incorporating that provision’s language.

**(d) How does the provision in 3 V.S.A. § 814 stating that an existing license does not expire while a timely and sufficient application for renewal is pending relate to these explicit commitments and orders? Specifically, do the Docket 6545 MOU and the Board’s Orders (not the CPGs themselves) in Dockets 6545 and 6082 constitute “licenses” within the meaning of Section 814? In particular, the Board’s June 13, 2002, Order in Docket 6545 states “Absent issuance of a new Certificate of Public Good or renewal of the Certificate of Public Good issued today, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear Power Station after March 21, 2012.” In addition, the Docket 6545 MOU also contains Entergy’s agreement that “Any such Board order approving the sale shall be so conditioned, and any Board order issuing a CPG to ENVY and ENO shall provide that operation of VYNPS beyond March 21, 2012 shall be allowed only if application for renewal of authority under the CPG to operate the VYNPS is *made and granted*.” (Emphasis added).**

Section 814 of Title 3 applies by its express terms. Section 801(3) of Title 3, Vermont Statutes Annotated, defines “license” as “the whole or part of any agency permit, *certificate*, approval, registration, charter, or similar form of permission required by law.” 3 V.S.A. § 801(b)(3) (emphasis added). The Board is an “agency” under the Vermont Administrative Procedure Act (“VAPA”). See 3 V.S.A. § 801(b)(1) (defining “agency” to be “a state *board*, commission, department, agency, or other entity or officer of state government, other than the legislature, the courts, the Commander in Chief and the Military Department, authorized by law to make rules or to determine contested cases”) (emphasis added).<sup>20</sup> There is no dispute that Entergy VY made timely and sufficient application for a CPG in March 2008 for purposes of 3 V.S.A. § 814(b).

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<sup>20</sup> The Vermont Supreme Court has recognized that the Board is subject to the provisions of the VAPA. See *Town of Cavendish v. Vermont Pub. Power Sup. Auth.*, 141 Vt. 144, 147, 446 A.2d 792 (1982) (recognizing the Board has the authority to issue declaratory ruling by virtue of 3 V.S.A. § 808, part of the VAPA, which states that “[e]ach agency shall provide for the filing and prompt disposition of petitions for declaratory rulings as to the applicability

The Memorandum of Understanding approved in Docket No. 6545 was entered into by the parties and approved, in part relevant to the Board's questions, by the Board in 2002. At that time, neither the parties nor the Board could have reasonably anticipated the subsequent enactment of Act 74 and Act 160. In 2002, the parties and the Board instead had every reason to expect that the Board would be able to decide, in accordance with the Board's normal administrative processes, any CPG application that Entergy VY might file. Act 74 and Act 160, however, interposed legislative-approval requirements that defeated these expectations of the parties and the Board. In these circumstances, interpreting the quoted provisions of the 2002 MOU in the literal manner suggested by the question would be inconsistent with the intent of the parties and the Board. Further, these provisions also cannot be applied in that literal manner consistent with the District Court Decision because requiring Entergy VY to obtain a new or amended CPG prior to March 22, 2012, would penalize it for the delays in the CPG-approval process caused by the preempted legislative-approval requirements in Act 74 and Act 160 that the District Court has permanently enjoined.

St. Johnsbury, Vermont. March 7, 2012.

Respectfully submitted,

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of any statutory provision or of any rule or order of the agency"); *Pet. of Green Mountain Power Corp.*, 131 Vt. 284, 304, 305 A.2d 571 (1973) (noting that an administrative agency such as the Board has the power to take official notice of judicially cognizable facts provided it follows the proper procedure found in the VAPA); *In re Pet. Vt. Welfare Rts. Org.*, 132 Vt. 622, 627, 326 A.2d 828 (1974) (applying provisions of the VAPA to the Board); *Pet. of Village of Hardwick Elec. Dept.*, 143 Vt. 437, 444, 466 A.2d 1180 (1983) (stating that the Board is subject to the VAPA). The Vermont Supreme Court has recognized a CPG as something akin to a license. *See Pet. of Burlington Elec. Dept.*, 151 Vt. 543, 545-46, 563 A.2d 264 (1989) (in the context of describing whether a CPG can be amended, court cites VAPA for the proposition that an agency cannot modify an existing license without a hearing).